KELLEY DRYE & WARREN LLP
A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, N.Y.
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May 30, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; CC Docket No. 96-98

Dear Mr. Caton:

Enclosed herewith for filing are the original and eighteen (18) copies (including two copies marked "Extra Public Copy") of Cable & Wireless, Inc.'s ("CWI") Reply Comments regarding the above-captioned matter. CWI simultaneously is submitting, under separate cover, a 3.5 inch diskette containing an MS DOS 5.0/WordPerfect 5.1 version of its Reply Comments.

Please acknowledge receipt of this filing by date-stamping the duplicate provided and returning it to the bearer.

Respectfully submitted,

John J. Heitmann

Enclosures
cc: Janice Myles -- Room 544 (5 copies)
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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF CABLE & WIRELESS, INC.

Of Counsel

Rachel J. Rothstein
Ann P. Morton
CABLE & WIRELESS, INC.
8219 Leesburg Pike
Vienna, Virginia 22182
(703) 734-4439

Danny E. Adams
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

May 30, 1996

SUMMARY

The critical importance of this proceeding to the future of local competition, and the telecommunications industry in general, was demonstrated by the fact that more than 250 parties filed several thousand pages in the initial round of comments. Most of these parties addressed dozens of key issues. The Commission faces a monumental task in reviewing this record and preparing a final order within the statutory time frame permitted.

Cable and Wireless, Inc. ("CWI") urges the Commission, in the extremely short period required for action, not to lose sight of the "big picture" as it addresses the hundreds of important details. The congressional intent to be served here is made clear by the comprehensive scope of the '96 Act and by the unprecedented and swift action which it mandates. These factors demonstrate that Congress desires that the regulatory framework for implementing local competition be established as rapidly as possible. This overarching purpose for the '96 Act translates into some key guiding principles for this proceeding.

First, the processes that the Commission establishes should be chosen for their speed and efficiency in instituting local competition. This clearly means detailed FCC guidance on all important matters. Simply leaving decisions to 50 state commissions, private negotiations or industry committees, without detailed directions from the FCC, will ensure that the process takes years to complete. This is not the intent of the '96 Act.

Second, the Commission should follow a policy of maximum flexibility for new local entrants in order to let the marketplace develop as it should. This means resisting the pleas of the ILECs for only minimal specific requirements for interconnection and unbundling. The Commission should mandate a substantial number of minimum points of interconnection and set a comprehensive list of unbundled network elements. If local competition is to

develop, with the congressionally desired rapidity and effect, specific and complete guidance from the FCC is required on both points of interconnection and network elements to be unbundled. Similarly, the Commission should avoid the definition of "technical feasibility" advocated by the ILECs, with its multiple tests and time-consuming application procedures, and adopt the simple approach proposed in the *Notice*. Further, the Commission should reject the ILEC proposals to impose restrictions on resale services.

Third, the Commission must not give in to the ILECs' many requests for artificial constraints on new entrants' use of interconnection, unbundled elements and resold services. All such proposals have a common theme: the preservation of cross-subsidizing and non-cost-based pricing schemes. All such approaches are antithetical to local competition and, thus, to the goals of the '96 Act. Ultimately, if competition is to flourish, prices must be based on costs, and facilities and resold services must be available for use in whatever manner the purchaser chooses.

Finally, the Commission should require pricing standards which are reasonable and which guarantee the success of local competition. The consensus among the non-ILEC commentors clearly favors the TSLRIC cost methodology, with some adjustment for forward-looking joint and common costs for network elements This approach will balance fairness to the ILECs' cost recovery needs with competitive neutrality and the needs of new local entrants. In contrast, the fully distributed and ECPR cost methodologies favored by the ILECs will defeat the entire scheme sought by the '96 Act. For resale purposes, the Commission should disallow the addition of new costs to wholesale prices and should order that wholesale prices be based on retail prices less selected USOA accounts. In sum, the

Commission should not establish all the prerequisites for local competition and then permit them to fail because they are priced anticompetitively.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
To: The Commission	)	

REPLY COMMENTS OF CABLE AND WIRELESS, INC.

Cable and Wireless, Inc. ("CWI"), by its attorneys, respectfully submits these Reply Comments regarding the Federal Communications Commission's ("FCC" or the "Commission") implementation of the local competition provisions in the Telecommunications Act of 1996 ("'96 Act" or "Act")[1] in the above-captioned matter.[2] As explained further below, CWI believes the record compiled in this proceeding supports the establishment of national guidelines and standards along the lines proposed in the *Notice* and supported by CWI in its initial Comments.

I. GENERAL

The stringent timetables established in the '96 Act for Section 251 implementation make clear both the importance attached to this proceeding by the Congress and the legislative intent that local competition be introduced as rapidly as possible. The Comments filed on May 16 demonstrate that this Congressional goal will be realized *only* if the

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) *(to be codified as* 47 U.S.C. §§ 151 *et seq.*) [hereinafter "*'96 Act*" or "Act"].

[2] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996) [hereinafter "*Notice*"].

Commission adopts a detailed set of national guidelines and benchmarks. Referring matters to the 50 state PUCs, industry committees, or private negotiations, without leadership from the FCC, will guarantee that the Congressional desire for rapid implementation of Section 251 will be thwarted. Of this, there can be no doubt.

After pressing vigorously for several years for congressional repeal of the MFJ, and despite unanimously endorsing the '96 Act prior to its passage, the Bell Operating Companies' ("BOCs") Comments indicate that they have not yet accepted the bargain they struck. Where local competition is concerned, the BOCs advocate processes guaranteed to take years to finish and to result in a patchwork of disparate regulations and requirements which will serve only to make competing with them, when it finally becomes possible, more cumbersome and prohibitively expensive. Some BOCs have abandoned their endorsements of the '96 Act even to the point that they now contend that parts of it are unconstitutional Interestingly, none of the BOCs sought to support their view of the preferred implementation processes on the basis it would provide the fastest and most effective route to the establishment of local competition. Rather, the BOCs argue—based on fairness *to them*—that the '96 Act mandates slow and convoluted procedures. This is not the will of Congress.

A. Scope of Regulation

The question of the proper scope of the Commission's involvement in setting standards and guidelines for the introduction of local competition under Section 251 elicited widely divergent responses.[3] In large part, the Comments address two separate issues: the

[3] 47 U.S.C. § 251.

policy intent of the Congress and the *legal* limitations imposed by the interplay of Section 2(b) of the 1934 Act and Section 251 of the '96 Act.[4]

1. National Standards [¶¶ 26-27, 29-33]

As a group, the ILECs uniformly advocate a policy of minimal FCC involvement in the interconnection and unbundling processes. These commentors essentially assert that Congress intended to leave such matters to private party negotiations and state PUC review. In other words, the ILECs maintain that Congress intended for the process of establishing standards for entry into local competition to be left to a hodgepodge of private and public actions. However, as the Department of Justice noted, "[t]here is no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements that they do so."[5] Several commentors, including the Department, noted that in many cases, ILECs have refused outright or otherwise made it impossible to commence negotiations, while other failed attempts to reach negotiated agreements are being arbitrated by state PUCs in the context of prolonged and contentious proceedings.[6] Given this factual backdrop, Congress clearly did not seek to perpetuate the current regime in which ILECs are able to stymie

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[4] *Id.* §§ 152(b), 251.

[5] DOJ Comments at 9.

[6] In Ohio, for example, Time Warner filed a complaint against Ameritech alleging a lack of good faith in interconnection negotiations. Despite the Ohio PUC's order to negotiate and the issuance of interim rulings, disputes between the parties continue. In additional cases, new entrants reportedly have experienced refusals by incumbents to negotiate unless the new entrant agreed to various criteria, including confidentiality agreements. In other cases, ILECs reportedly have refused to negotiate unless the new entrant already has been certificated by the appropriate state PUC.

competitive entry due to their vastly superior bargaining power and the uneven development of state rules for local competition.

Rather, the '96 Act, by its explicit language, evinces Congress' intent for the FCC to act decisively and quickly to establish a national framework to guide the processes of private negotiation and state PUC implementation. As the Department of Justice noted:

> Drawing on the experience and insight from the pioneering efforts of many states to open local markets, Congress adopted the model that it considered most likely to succeed in promoting rapid, effective, and economically efficient competitive entry in local markets throughout the country, and directed the Commission to adopt regulations implementing that model.[7]

Moreover, CWI agrees with the Department that: "Clear national standards are critical to assure that entrants will have prompt access to essential facilities or services of incumbent monopolists, on economically appropriate terms."[8] Thus, only this approach, advocated by CWI, the Department of Justice and many others, will lead to the rapid development of robust and effective local competition on the schedule sought by the '96 Act.

That Congress did not intend to minimize the Commission's role is demonstrated most clearly by the fact that after it set forth and imposed six crucial obligations on ILECs (including the duty to negotiate, interconnect, unbundled access, allow resale, give notice of changes and permit collocation), in the very next subsection, it chose to vest in the FCC the power to "*complete all actions necessary to establish regulations to implement the*

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[7] DOJ Comments at 8.

[8] *Id.* at 8.

requirements of [Section 251]."[9] This demonstrates clearly that Congress did not intend to minimize the FCC's role as suggested by the ILECs.

Congress' intent that the FCC would take the lead in establishing a national framework for competition is further evidenced by the explicit instructions addressed to the Commission in Section 251(d)(2).[10] In that section, Congress demands that the Commission consider various factors prior to determining which network elements should be unbundled. The construction of this section advanced by the ILECs would proscribe the role of the FCC and, in the process, render this section a nullity. This view flouts well-established principles of statutory construction.

Further evidence of Congress' intent for the FCC to lay the foundation for the interconnection process is found in Section 251(d)(3), which allows for the preservation of state access regulations.[11] In this Section, Congress directs the FCC *not* to "preclude the enforcement of" any state regulation or ruling that meets the following three criteria:

> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements [of Section 251]; and
>
> (C) does not substantially prevent implementation of the requirements of [Section 251] and the purposes of this part.[12]

This statutory language strongly indicates that Congress intends for the Commission to establish rules governing interconnection and related issues, and in all instances other than

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[9] 47 U.S.C. § 251(d)(1) (emphasis added).

[10] *Id.* § 251(d)(2).

[11] *Id.* § 251(d)(3).

[12] *Id.*

those enumerated, the Commission has the power to preempt state regulations and rulings inconsistent with the national framework it is responsible for establishing.

Thus, the congressional directive to the FCC contained in Section 251(d)(1)—to enact implementing rules within six months—makes clear that the FCC is to take the lead in setting guidelines and standards to govern the obligations imposed elsewhere in Section 251.[13] That Congress set an expedited six month time frame within which the Commission must accomplish this task only underscores that Congress wants to see the prompt introduction of local competition and has delegated the necessary authority to the Commission to ensure that this goal is realized across the nation.

Many commentors cited additional reasons in support of national rules. CWI agrees with the Department of Justice that "clear national standards, by narrowing the range of permissible outcomes, will reduce the ILECs' ability to use their superior bargaining position to retard competitive entry."[14] Moreover, CWI agrees with the Department assessment that:

> Without clear national standards, the outcome of the negotiation and arbitration process established by section 252 will differ from state to state, and will be more difficult to predict. Entrants will be required to litigate the same issue in state after state, adding substantially to the time and cost of entry, and creating uncertainty that may impede investment. The absence of clear rules would also compound the complexity of the arbitration task that individual states would confront in the absence of Commission guidance. Even if each state ultimately reaches the "right" outcome, the uncertainty inherent in such state-by-state regulatory decision-making will seriously delay and impede entry. And recognizing these facts, ILECs will have

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[13] *Id.* § 251(d)(1).

[14] DOJ Comments at 11.

> substantially greater incentives to delay and litigate, rather than negotiate reasonable arrangements with entrants.[15]

There are also compelling public policy reasons in favor of adopting national rules. First, as noted in the Department of Justice's and CWI's initial Comments, "many of the technologies that are driving current and predicted telecommunications developments are national in scope, as are many of the competitive strategies under which the new technologies will be deployed."[16] By preventing the balkanization of national businesses that could result from a disparate patchwork of regulation, "[u]niform rules are more likely to reduce both capital and operational costs for entrants and thereby facilitate the industry changes desired by Congress."[17]

Second, as discussed above, the six month timeframe given to the Commission to promulgate rules to implement Section 251 evidences a congressional intent to effect the desired industry changes that will produce effective local competition sooner rather than later. CWI agrees with the Department of Justice that "there is no doubt that [national] standards can be implemented long before one could expect all fifty states (or even a substantial majority of them) to develop the necessary standards on so many issues, especially in light of the many other responsibilities that the states must exercise under the Act."[18]

Finally, clear national standards will aid other government agencies and federal courts in performing their responsibilities under the Act. Absent national standards, state PUCs,

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[15] *Id.* (footnote omitted).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 12-13.

"many of which face serious resource constraints, will be compelled to devote extensive efforts towards resolving the complex issues that the Commission, through this rulemaking, has studied carefully already."[19] Additionally, the Department of Justice points out that, "[n]ational standards will also provide useful guidance to the federal district courts that will be required to review state arbitration decisions, facilitating their understanding of the issues and promoting judicial consistency in resolving issues critical to the accomplishment of the Act's goals."[20]

2. Legal Limits [¶ 37]

In spite of the FCC's clear statutory mandate, Bell Atlantic insists that the Commission does not have the jurisdictional authority necessary to complete the tasks Congress has delegated to it.[21] Relying on an overly expansive reading of *Louisiana Public Service Commission v. FCC*,[22] Bell Atlantic contends that Section 2(b)[23] precludes the Commission from regulating the intrastate aspects of local exchange competition.[24] However, Bell Atlantic's reliance on *Louisiana Public Service Commission* is misplaced.

Louisiana Public Service Commission is not a constitutional case. Accordingly, the Supreme Court did not hold that there is a permanent bar to the FCC's assertion of

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[19] *Id.*

[20] *Id.* at 13.

[21] Bell Atlantic Comments at 4-7.

[22] 476 U.S. 355 (1986).

[23] 47 U.S.C. § 152(b).

[24] Bell Atlantic Comments at 4.

jurisdiction over particular intrastate matters.[25] Rather, the Court held that although Congress could delegate to the Commission the power to preempt state regulation of depreciation of dual jurisdiction property for intrastate rate making purposes, the language of Section 220[26] is not so "unambiguous or straightforward" as to override the command of Section 2(b)[27] that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service.[28] Thus, although Congress could have delegated to the Commission the authority to preempt state regulation, the Court in *Louisiana Public Service Commission* found that in the case of Section 220, it had not done so.[29]

Here, however, in the case of Sections 251-53, Congress was unequivocal and straightforward in its grant of authority.[30] As discussed above, its intent to override Section 2(b) is evinced by several of the local competition provisions of the '96 Act, where Congress explicitly delegates authority to the Commission.[31] For example, Section 251(d)(1) vests in the Commission the authority to implement rules necessary to implement the interconnection, unbundling and resale obligations of Section 251.[32] Bell Atlantic's view that Section 2(b) prohibits the FCC from asserting jurisdiction of the inherently intrastate portions of local

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[25] 47 U.S.C. § 152(b).

[26] *Id.* § 220.

[27] *Id.* § 152(b).

[28] *Louisiana Public Service Comm'n*, 476 U.S. at 377.

[29] 47 U.S.C. § 220.

[30] *Id.* §§ 251-53.

[31] *Id.* § 152(d).

[32] *Id.* § 251(d)(1).

service renders Section 251(d)(1) nonsensical.[33] Similarly, if Section 2(b) were to act as a permanent bar to FCC jurisdiction over intrastate services, the Commission could not step into the role of state PUCs, as mandated by Section 252(e)(5), in cases where those PUCs fail to carry out responsibilities for arbitrating and mediating stalled negotiations between new entrants and incumbents.[34] The fact that Congress stated that "the Commission *shall* issue an order *preempting* the State commission's jurisdiction"[35] in such cases is evidence enough that Congress did not think that *Louisiana Public Service Commission* required it to rewrite Section 2(b) before delegating to the Commission authority, in particular sections of the '96 Act, over intrastate local services.[36]

B. Prevention of Discrimination [¶¶ 269-272]

One of the crucial roles to be played by the FCC in implementing the '96 Act is the prevention of unfair discrimination in interconnection arrangements or network unbundling. The Commission has two key tools to assist it in this important objective: public disclosure of all interconnection agreements and the availability to all carriers of any aspect of another's arrangement. Not surprisingly, the BOCs oppose both of these requirements.

The '96 Act is unequivocal in its mandate that all interconnection agreements be publicly disclosed. Section 252(e)(1) directs that *any* interconnection agreement "adopted by negotiation or arbitration" be reviewed and approved by a state commission.[37] Section

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[33] *Id.* §§ 152(b), 251(d)(1).

[34] *Id.* § 252(e)(5).

[35] *Id.* (emphasis added).

[36] *Id.* §§ 152(b), 251-53.

[37] *Id.* § 252(e)(1).

252(h) requires that, within 10 days of approval, the state commission must make the agreement available for public inspection and copying.[38] The pleas of some ILECs notwithstanding, this requirement covers *all* interconnection agreements and is *not* waivable.

Section 252(i) requires that LECs "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[39] The plain meaning of this provision is that *any* carrier can purchase *any* interconnection, service or network element provided to another carrier without having to subscribe to the entire agreement.

In its Comments, AT&T urges the Commission to enforce the plain meaning of Section 252(i)[40] and confirm the ILECs' obligation to make interconnection, services or network elements provided thereunder available to carriers on an unbundled basis, consistent with the intent of Congress.[41] CWI agrees that this obligation is required so as not to "limit the options available to new entrants" or "permit the LEC to discriminate between the original and subsequent requesting carriers, all to the detriment of competition and consumers."[42] Like AT&T, MCI suggests that a carrier should be allowed to take individual elements of negotiated agreements.[43] Indeed, MCI recognizes that "[f]orcing a

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[38] *Id.* § 252(h).

[39] *Id.* § 252(i).

[40] *Id.*

[41] AT&T Comments at 89-90.

[42] *Id.* at 90.

[43] MCI Comments at 96.

carrier to take the entire package could permit, and even encourage, discrimination of the kind Section 252(i) is intended to prohibit."[44] CWI agrees with both AT&T and MCI and urges the Commission to reject contrary proposals.

In contrast, USTA contends that Section 252(i)[45] does not permit carriers to pick and choose provisions from negotiated agreements, in part because this would alter the "individualized nature" of negotiations.[46] USTA, however, has it backwards. The Senate Commerce Committee Report explicitly states that this section is intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated "[47] Thus, despite USTA's position, the Committee Report indicates that allowing carriers to choose among individual elements will better serve the needs of individual competitors.

Likewise, Ameritech opposes the freedom of carriers to choose specific provisions and advocates instead that only the entire agreement should be made available.[48] BellSouth also interprets Section 252(i)[49] to mean that only the agreement in its entirety must be made available to other similarly situated carriers willing to accept all of the same terms and conditions.[50] Simply stated, this is not the intent of Congress. In fact, USTA, Ameritech

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[44] *Id.*

[45] 47 U.S.C. § 252(i).

[46] USTA Comments at 96.

[47] *Senate Commerce Committee Report*, March 30, 1995, at 22.

[48] Ameritech Comments at 98.

[49] 47 U.S.C. § 252(i).

[50] BellSouth Comments at 81.

and BellSouth all ignore the plain meaning of the statute According to Section 252(i), "any" interconnection, service, or network element must be made available so that new entrants can become competitive in the local market.[51] If ILECs were permitted to limit offerings to entire agreements, as AT&T points out, they could insert a "'poison pill' containing onerous terms for a service or network element that the original customer does not need, in order to discourage subsequent carriers from making a request under that agreement."[52] Instead, carriers should have the freedom and flexibility to choose individual elements contained in negotiated interconnection agreements. This approach is firmly rooted in the legislative history detailed in the Commission's *Notice* in paragraph 271.[53]

II. INTERCONNECTION

A. Need For National Rules [¶ 50]

As the preceding discussion demonstrates, the need for uniform national rules for interconnection standards is clear and compelling. CWI endorses the following views of the Department of Justice on this point:

> As a general proposition, we believe that there is a positive relationship between the clarity of applicable legal rules and the cost and speed of compliance therewith, a relationship that is stronger in this context because of the likely economic incentives of the negotiating parties. As the Commission recognizes, in the past, questions pertaining to interconnection have engendered lengthy, and sometimes fruitless, negotiations between parties and regulators that retarded competitive entry. Uniform national interconnection rules can be expected to provide sufficiently clear guidance to move the

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[51] 47 U.S.C. § 252(i).

[52] AT&T Comments at 90, n.139.

[53] *Notice* at ¶ 271.

> process along more quickly than would be the case under divergent state-imposed rules.[54]

Virtually all new and potential local entrants strongly supported this view.

The opponents of national uniform guidelines generally were the ILECs and state PUCs. Neither group, however, offers a convincing explanation of how hundreds of individual negotiations or dozens of state proceedings will serve to achieve the goals of the '96 Act more rapidly or effectively *without* a governing set of national guidelines established by the FCC. It is easy to understand the ILECs' preference for individual interconnection negotiations conducted under cover of an uneven patchwork of state regulation. The resulting maintenance of the *status quo* would serve ILECs' *private* interests by delaying entry of some competitors and thwarting that of others altogether. Common sense, however, suggests that the *public* interest will be served better by the establishment of detailed national guidelines because they clearly can provide the fastest and most effective means to achieve the robust and effective local competition envisioned by Congress.

Pacific Telesis' description of its absurd preferred process for determining interconnection obligations (inadvertently) provides a near perfect illustration of the problems created by leaving the details of interconnection to negotiation without overarching federal guidelines. Under the PacTel plan, a competitor would be required to first:

> [S]ubmit a bona fide request containing a certification that it intends to use the requested interconnection or unbundled element in the provision of a competitive exchange or exchange access service; a full description of the functionality requested, including illustrative diagrams and technical requirements and specifications where necessary; and a commitment to pay the reasonable costs of implementing the request.[55]

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[54] DOJ Comments at 14.

[55] PacTel Comments at 23.

It takes little imagination to devise dozens of ways that PacTel could find an interconnection request to be unacceptable under this plan.

But that's not the end. Next, after receiving this application, with its illustrative diagrams, full technical specifications and commitment to pay whatever unknown amount PacTel later declares is owed, PacTel would evaluate the request for technical feasibility. To assist itself in its own determination of technical feasibility, PacTel supplies the following definition:

> Technical feasibility is the determination of a LEC's ability to provide a requested interconnection arrangement or unbundled service in a nondiscriminatory manner, using currently available technology in service or under deployment, and within the time requested, or within a negotiated time. Technical feasibility will include, but not be limited to: (1) ability to maintain network integrity without undermining network reliability, increasing the risks of physical damage, service impairment, service degradation, service outage, or creating a hazard or security threat to customers, customer communications, proprietary information, or operating personnel; (2) ability to deliver network elements that are discrete, standalone, physical or logical functional components of the existing network that, in turn, comply with national standards; (3) ability to assure that physical and/or logical interconnection points are provided so that they meet the service and network security needs of the requesting service provider, the incumbent LEC network, and the public; (4) ability to meet applicable or negotiated performance parameters (*e.g.*, post-dial delay, cross network packet delay, transmission levels); (5) sufficient capacity to supply the item on a nondiscriminatory basis to multiple requestors; (6) negotiation of support systems to administer, provision, maintain, or order without unique or special handling or billing; (7) willingness to pay costs with a reasonable profit; (8) ability of requested interconnection or element to successfully complete a field trial evaluation or other field trial evaluation (if publicly available); and (9) ability of equipment vendors to develop and/or support a requested capability.[56]

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[56] *Id.* at 23-24; *see also*, SBC Comments at 27; USTA Comments at 12-13.

Finally, just in case a potential competitor survives the process through this point, PacTel adds that "the process should establish time for the LEC to request additional information if necessary."[57]

In short, PacTel's proposal demonstrates the ability and intent of ILECs to delay or thwart new entry in the absence of national rules. Furthermore, PacTel's proposal for negotiations pursuant to an incumbent monopolists' (rather than the FCC's) guidelines, provides all the proof needed of the truth of the Department of Justice's statement that "basic economic theory, long experience, and common sense" all recognize that without national standards "incumbent monopolists would only grudgingly negotiate arrangements to facilitate competitive entry."[58] Mindful of the PacTel example, the Commission should follow the Department's recommendation and adopt national uniform rules for interconnection, as it proposed in the *Notice*.[59]

B. Duty to Negotiate [¶¶ 46-48]

CWI also points to the Department of Justice's Comments to support the need for FCC guidance on the duty to negotiate in good faith. There, the Department aptly notes that:

> There is no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements that they do so. Negotiations between incumbent monopolists and new competitors over access and interconnection

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[57] PacTel Comments at 24.

[58] DOJ Comments at 5.

[59] *Notice* at ¶ 50.

> have frequently been prolonged and difficult, replete with claims that the incumbent has engaged in delaying tactics . . . .[60]

DOJ further emphasized that "[c]omplaints by competitors against ILECs have multiplied over the past few years."[61] In just the past two years, the Department notes, formal complaints have been filed by competitors against Ameritech, SBC, U S West and NYNEX.[62]

CWI believes that an important mechanism in adjudging claims of bad faith in negotiation will be the comparison of agreements made with other, similarly situated local competitors. A refusal to provide to CWI the same arrangements previously provided to another competitor, such as AT&T or MCI, should be deemed to establish a *prima facie* case of bad faith. To ensure the detection of this sort of discriminatory treatment, Congress expressly directed, in Section 252(h), that *all* agreements must be publicly disclosed.[63] If non-disclosure agreements were permitted, as proposed by several ILECs,[64] the Commission would lose its most effective tool in combatting discrimination and deterring bad faith in negotiations.[65] Moreover, such action would set the Act's implementation on an

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[60] DOJ Comments at 9.

[61] *Id.*

[62] *Id.*

[63] 47 U.S.C. § 252(h).

[64] *See, e.g.*, U S West Comments at 39.

[65] These ILEC requests for non-disclosure of interconnection agreements are puzzling in light of the plain language of Section 252. 47 U.S.C. § 252. Section 252(e)(1) requires that "*[a]ny* interconnection agreement adopted by *negotiation or arbitration* shall be submitted for approval to the State commission." *Id.* § 252(e)(1) (emphasis added). Moreover, Section 252(h) mandates that "[a] State commission shall make a copy of each agreement approved under subsection (e) . . . available for public inspection and copying within 10 days after the

(continued...)

uncertain course by enticing ILECs to argue for numerous other "regulatory loopholes" notwithstanding the plain language of the '96 Act.

C. Technical Feasibility Standard [¶¶ 56-63]

In its initial Comments in this proceeding, CWI advocates an approach to technical feasibility that incorporates the presumption that all requested interconnections are feasible and places the burden of rebutting that presumption on the ILECs. The Department of Justice aptly noted that "[s]uch an allocation of the burden of proof is consistent not only with the statutory language favoring interconnection, but also with the fact that much of the relevant information as to network design and costs is in the possession of ILECs."[66] While CWI still supports this approach, the Comments of several BOCs provide convincing evidence that specific FCC guidance also is necessary -- even with the presumption of technical feasibility and the burden of proof placed on the ILECs. For example, PacTel's view of "technical feasibility," discussed and quoted above, demonstrates that, even with the obligation to carry the burden of proof, a determined BOC could make interconnection requests slow, cumbersome and expensive. Clearly, such a proposal, with its multiple hoops and hurdles, runs counter to the goals underlying the '96 Act.

In choosing a minimum list of interconnection points which are deemed "technically feasible," the record of this proceeding supports the tentative conclusion in the *Notice* that all interconnection points should be presumed technically feasible if already provided to a carrier, or if another LEC employing similar technology provides it. Using this approach,

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[65](...continued)
agreement or statement is approved." *Id.* §§ 252(e) and (h). Thus, these provisions leave no room for the BOCs' proposed non-disclosure of interconnection agreements.

[66] DOJ Comments at 21.

the Commission could put in place the basic interconnection requirements needed to allow local competition to take root.

Thus, the Commission should reject the pleas of some ILECs that the minimum list of technically feasible points should be left to negotiation [67] Only with the basic list of interconnection points established, and the presumptions outlined above in place, should the FCC leave the determination of interconnection points to private negotiations. To do otherwise would undermine the objectives of the '96 Act.

D. Limits on Use [¶¶ 60-62]

CWI supports AT&T's view that no limits should be placed on the use of interconnection arrangements.[68] The various ILEC proposals to impose such limits are nothing more than attempts to preserve a non-cost-based pricing structure by artificially segregating services. Moreover, these limitations are destined to fail as the local telecommunications marketplace becomes competitive As the Department of Justice points out in its Comments:

> [T]he development of a competitive market will require the FCC and the states to adopt new approaches for promoting important social goals, including universal service. The regulatory policies designed to achieve such goals in a monopoly environment cannot function properly as we move to competition.[69]

In fact, not only are artificial restrictions on use of interconnection arrangements inconsistent with competition, they are destructive to it Preserving non-cost-based pricing for non-economic purposes—the inevitable outcome, if the Commission accepts the ILECs'

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[67] *See, e.g.*, USTA Comments at 10-11.

[68] AT&T Comments at 27.

[69] DOJ Comments at 52.